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Party to the WaterFix Hearing
Principal, California Water Research

**BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

HEARING IN THE MATTER OF
CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
BUREAU OF RECLAMATION
REQUEST FOR A CHANGE IN POINT OF
DIVERSION FOR CALIFORNIA WATER
FIX

PROCEDURAL OBJECTION TO ANY
“CORRECTION” BY DWR OF CHANGE
PETITION TO INCLUDE OPERATING
SCENARIOS OTHER THAN THE
RDEIR/SDEIS PREFERRED
ALTERNATIVE

Deirdre Des Jardins, Principal at California Water Research (“California Water Research”) hereby objects to any use by the Petitioners of testimony submitted in Phart 1 of the WaterFix hearing to “correct” the Change Petition to include operating scenarios other than the RDEIR/SDEIS Preferred Alternative, especially operating scenarios that were undisclosed or unspecified before the Change Petition Hearing Notice was issued. As argued below, such a procedure is against both the requirements of due process under Article I, § 7 of the California Constitution, and a fair hearing under California Code of Civil Procedure § 1094.5.

BACKGROUND

1 The Partially Recirculated Draft Environmental Impact Report /Supplemental Draft
2 Environmental Impact Statement (“RDEIR/SDEIS”) was submitted with the Change Petition.
3 (Exhibit SWRCB-3.) The preferred alternative in the RDEIR/SDEIS is Alternative 4A,
4 described in Section 4, “New Alternatives.” The RDEIR/SDEIS specifies two operational
5 scenarios, H3 and H4, and indicates that the proposed initial operations of the project are a range
6 between H3 and H4.

7 In the February 11, 2016 Pre-Hearing Conference Ruling, the Hearing Officers ruled that
8 the information submitted in support of the Petition was sufficient, based on the RDEIR/SDEIS:

9 “California Code of Regulations, title 23, section 794 contains a detailed list of
10 information that must be provided in a change petition, including effects on other known
11 users of water, and any quantified changes in water quality, quantity, timing of diversion
12 and use, reduction in return flows and other pertinent information. The petitioners’
13 change petition specifies that this information is contained in the CEQA/NEPA
14 documents. (See Environmental Information form attached to Petition at 1 [Specific
15 discussions of the components of Alternative 4A most relevant to petition found within
the Partially Recirculated Draft Environmental Impact Report /Supplemental Draft
Environmental Impact Statement at sections 1.1, 1.1.4, 4.1, 4.1.2.2-4, 4.3.7-8, 11.1.2,
Appendix A and 3B.) *Id.* at 6.

16 Petitioners’ witness, Jennifer Pierre then testified in the WaterFix Hearing that the
17 proposed operations for Alternative 4A, the preferred alternative in the RDEIR/SDEIS were a
18 range from H3 and H4, and that the proposed initial operations in the Draft Biological
19 Assessment, called H3+, was in the range between H3 and H4:

20
21 Moving into the last column relative to operations, the EIR/EIS identified the
22 range of H3 to H4 as the Alternative 4A. And that's what's evaluated in the recirculated
23 draft. In the biological assessment that was released in January, we picked a point
24 between H3 and H4, and that we call H3-Plus.
(Tr. July 29, 2017, 39:19-24.)

25 However, the information in the RDEIR/SDEIS was scattered, vague, and unclear on “the
26 proposed diversion, release and return flow schedules,” “any effects of the proposed change(s)
27 on fish, wildlife, and other instream beneficial uses,” and “identification in quantitative terms of
28

1 any projected change in water quantity, water quality, timing of diversion or use, consumptive
2 use of the water, reduction in return flows, or reduction in the availability of water within the
3 streams affected by the proposed change(s)” required under Title 23 C.C.R. § 794(a)(6), (8), (9).
4 Petition.

5 In the February 11, 2016 Pre-Hearing Conference Ruling, the Hearing Officers mandated
6 that the information required under section 794 must be provided in a “succinct and easily
7 identifiable format” in the Petitioners’ Cases in Chief:

8 The petitioners’ cases in chief must, to the extent possible, contain the information
9 required by section 794 of our regulations in a succinct and easily identifiable format.
10 The other parties will then be able to more accurately assess whether the proposed
changes would cause injury.
11 (*Id* at 7.)

12 Presumably this direction by the Hearing Officers was under Water Code § 1701.3(a)
13 which allows the Board to request information to “clarify, amplify, or correct, or otherwise
14 supplement” the information required for the Change Petition. But the Department of Water
15 Resources attempted to use the mandate to change the RDEIR/SDEIS preferred alternative,
16 Alternative 4A, from the proposed operations for the Change Petition to simply one of several
17 “operating scenarios.” Jennifer Pierre’s written testimony stated:

18 Because permitting requirements will not be known with certainty until the actual
19 permits have been issued, and because the approving agencies need to consider a
20 reasonable range of alternatives, the EIR/EIS includes a number of different operating
scenarios that capture a wide range of operational alternatives.

21 The operating scenarios evaluated, in conjunction with the proposed CWF conveyance
22 improvements, in the EIR/S include:

23 The initial operating criteria anticipated to be required for the proposed project
24 for ESA and CESA permitting purposes, and which are presented in the
25 RDEIR/SDEIS, Chapter 4, with Alternative 4A (the proposed project) as a
range between Operating Scenario H3 and Scenario H4.
26 (DWR 51, at 10:22-11:5.)

1 Pierre also testified that [s]ince the BiOp has not been issued and DWR and Reclamation
2 do not know the initial operational criteria, the analytical framework presented for Part 1 is a
3 boundary analysis.” (DWR 51, at 10:8-10.)

4 This “supplemental information” simply fails to meet the requirements of Title 23 C.C.R.
5 § 794. Section 794 requires clear and specific information, not an “analytical framework” or
6 “boundary analysis” which allows future unspecified operating criteria.

7 PCFFA/IFR previously objected to Petitioners’ Case in Chief modeling and other
8 evidence before the hearing, noting “even in [administrative] proceedings, with the relaxed
9 standards of admissibility, the evidence must be relevant and reliable.” *Aengst v. Board of*
10 *Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283. To the extent that DWR’s
11 witnesses provided testimony that the operations provided in the Change Petition and the
12 Petitioners’ modeling are only loosely related to actual initial operating criteria, which will be
13 available at some unspecified point in the future, the Petitioners have simply undermined the
14 relevance of their submitted evidence and testimony to the changes sought in the submitted
15 Change Petition.

16 California Water Research also noted in the January 31, 2017 submission to the Board
17 with respect to briefs at the end of Part 1 that

18 “the Hearing Officers’ deadline for Petitioners to provide information required under
19 Title 23 § 794 has lapsed. The issue of completeness of information required under Title
20 23 § 794 should therefore be considered before rebuttal, and if a time extension is
21 given for Petitioners to present the information on rebuttal, briefs on the adequacy of the
22 information provided in support of the Petition should be allowed at the conclusion of
23 rebuttal and sur-rebuttal.”

24 California Water Research hereby reiterates this request.
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1 Respectfully submitted,

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4 Deirdre Des Jardins
5 Principal, California Water Research
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7 Executed on this 11th day of July, 2017.
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STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation
(Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

Objection to “Correction” of the Change Petition

to be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated July 3, 2017, posted by the State Water Resources Control Board at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

I certify that the foregoing is true and correct and that this document was executed on July 11, 2017.

Signature:



Name: Deirdre Des Jardins

Title: Principal, California Water Research

Party/Affiliation:

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